89-369
No. 89-

Supreme Court, U.S.
FILED
SEP 5 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

GENERAL MOTORS CORPORATION,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

THEODORE L. GARRETT
(Attorney of Record)
COVINGTON & BURLING
1201 Pennsylvania Avenue, N.W.
P.O. Box 7566
Washington, D.C. 20044
(202) 662-5398

Of Counsel:

PATRICK J. MCCARROLL
General Motors Corporation
New Center One Building
3031 West Grand Boulevard
Detroit, Michigan 48232

September 1989

QUESTIONS PRESENTED

In 1985 the Commonwealth of Massachusetts revised its Clean Air Act implementation plan to provide an extension of time to 1987 for General Motors to comply with certain air regulations. Pursuant to a published EPA policy, the extension allowed GM time to build a new $200 million facility that achieved lower emissions than were otherwise required. EPA failed to approve or disapprove the Commonwealth's revision, and instead filed suit against GM seeking penalties for failure to meet the original deadline. The questions presented are:

1. Where EPA has failed to act on a revision to a state plan within four months, as required by the Clean Air Act, may the government bring an action for civil penalties against a company that is in compliance with the revised plan?

2. Whether the decision below undermines the ability of states to make ongoing policy choices as to air pollution control measures, and creates disincentives for even-handed administration of the Act?

3. Whether the decision below is contrary to the language and intent of Congress and decisions of this Court and other circuit courts?

TABLE OF CONTENTS

QUESTIONS PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
OPINION BELOW	1
JURISDICTION	2
STATUTES AND REGULATIONS INVOLVED	2
STATEMENT OF THE CASE	2
A. Statutory Background	3
B. The Massachusetts SIP Revision	5
C. The Proceedings Below	6
REASONS FOR GRANTING THE WRIT	8
I. THE DECISION BELOW CREATES A CONFLICT IN THE CIRCUITS	9
II. THIS CASE PRESENTS MAJOR ISSUES OF FEDERALISM, COMITY AND THE IMPLEMENTATION OF THE CLEAN AIR ACT	12
III. THE ISSUE PRESENTED INVOLVES IMPORTANT, RECURRING QUESTIONS CONCERNING ENFORCEMENT UNDER THE CLEAN AIR ACT	15
CONCLUSION	18
APPENDIX	1a

TABLE OF AUTHORITIES

Cases — Page

American Cyanamid Co. v. *EPA*, 810 F.2d 493 (5th Cir. 1987) ..... *passim*

Bethlehem Steel Corp. v. *EPA*,782 F.2d 645 (7th Cir. 1986) 3,14

Connecticut v. *EPA*, 696 F.2d 147 (2d Cir. 1982) 3

Council of Commuter Orgs. v. *Thomas* 799 F.2d 879 (2d Cir. 1986) 13

Duquesne Light Co. v. *EPA*, 698 F.2d 456 (D.C. Cir. 1983) 10,13

Indiana & Michigan Elec. Co. v. *EPA* 733 F.2d 489 (7th Cir. 1984) 14

Sierra Club v. *Indiana-Kentucky Elec. Corp.*, 716 F.2d 1145 (7th Cir. 1983) 16-17

Train v. *Natural Resources Defense Council*, 421 U.S. 60 (1975) 4,13,14

United States v. *General Motors Corp.*, No. 87-2068 (D. Mass. May 16, 1988) 6,7,14,15

United States v. *General Motors Corp.*, 876 F.2d 1060 (1st Cir. 1989) 1,7-9

Statutes

28 U.S.C. § 1254(l)(1982) 2

42 U.S.C. § 7407(a)(1982) 4

42 U.S.C. § 7409(1982) 3

42 U.S.C. § 7410(1982) 3

42 U.S.C. § 7410(a)(2)(1982) 2,4,13

42 U.S.C. § 7410(a)(3)(1982) 2,4,13

42 U.S.C. § 7502(a)(2)(1982) 5

Table of Authorities Continued

	Page
Administrative Actions	
46 Fed. Reg. 51,386 (1981)	5
53 Fed. Reg. 36,011 (1988)	17
310 CMR 7.18(7)	5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-

GENERAL MOTORS CORPORATION,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Petitioner General Motors Corporation[1] prays that a writ of *certiorari* issued to review the opinion and judgment of the United States Court of Appeals for the First Circuit in this case.

Opinion Below

The opinion of the Court of Appeals is reported at 876 F.2d 1060, and is reprinted in the Appendix to this petition at 1a.

---

[1] Subsidiaries and affiliates of General Motors are set forth in the Appendix at 19a pursuant to Rule 28.1.

Jurisdiction

The decision below was rendered on June 7, 1989. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1) (1982).

Statutes And Regulations Involved

This case involves a Clean Air Act enforcement action by the Environmental Protection Agency (EPA) against General Motors. Under the Act, EPA is required within four months to approve or disapprove revisions to State Implementation Plans (SIPs). 42 U.S.C. § 7410(a)(2), (3) (1982). The principal issue in this case is whether EPA's failure to do so prevents it from enforcing the prior state plan.

STATEMENT OF THE CASE

The questions presented in this case raise fundamental issues concerning the appropriate division of authority between the federal government and the states in the establishment and implementation of State Implementation Plans under the Clean Air Act. The Clean Air Act requires EPA to act promptly, within four months, either to approve or disapprove a revised SIP. EPA's refusal to take timely action on a SIP revision by a state, and EPA's decision instead to enforce the old SIP, unlawfully interferes with the state's right to select the regulatory alternative it will use to attain federal standards. Because of this fundamental infringement of state prerogatives, the Fifth Circuit held in a similar case that EPA may not collect penalties under the old SIP. *American Cyanamid Co.* v. *EPA*, 810 F.2d 493 (5th Cir. 1987).

Expressly disagreeing with the Fifth Circuit's approach in the *Cyanamid* case, the court below held that EPA may bring an enforcement action against General Motors despite EPA's failure to act on a SIP revision in a timely manner. The First Circuit acknowledged that Congress did not intend the states' legitimate policy choices to be held hostage to EPA's schedule. Without citing any concrete factual or legal basis for its conclusion, the First Circuit held that an enforcement bar is too drastic a remedy. GM's position would in fact not bar federal enforcement, but would simply require EPA to take prompt action on SIP revisions as required by law—a matter wholly within EPA's ability to control. The decision below creates a conflict in the circuits and raises important and recurring issues concerning the enforcement of the Clean Air Act.

A. Statutory Background

The Clean Air Act was designed to create a partnership between the federal government and the states in the regulation of air pollution.[2] Under the statute, the basic division of authority is straight forward: the federal government, through EPA, establishes national air quality goals, called the National Ambient Air Quality Standards. 42 U.S.C. § 7409 (1982). Each state then has the responsibility for establishing and administering a State Implementation Plan that will achieve those standards within its boundaries. 42 U.S.C. § 7410 (1982).

The statute emphasizes that "[e]ach state shall have the primary responsibility for assuring air quality

---

[2] Bethlehem Steel Corp. v. EPA, 782 F.2d 645, 647 (7th Cir. 1986); Connecticut v. EPA, 696 F.2d 147, 151 (2d Cir. 1982).

within the entire geographic area comprising such [s]tate. . . ." 42 U.S.C. § 7407(a) (1982). The Act gives each state the freedom to design its SIP as it chooses, selecting whatever mix of regulatory requirements it believes will best attain the national standards in a manner consistent with the state's political, economic and social policy concerns. The statute requires EPA review and approval of a SIP before it comes into force. However, so long as a SIP meets the basic statutory requirements, EPA *must* approve it. *Train* v. *Natural Resources Defense Council*, 421 U.S. 60, 79 (1975).

Congress anticipated that the design and administration of appropriate SIPs would be an ongoing process for the states. The statute therefore permits the states to amend their SIPs from time to time as they deem appropriate and requires EPA to approve and enforce the amended SIPs so long as they meet the minimum statutory requirements. When a SIP is promulgated or revised, EPA is required to approve or disapprove it within four months. 42 U.S.C. § 7410(a)(2), (3). This four-month deadline requires EPA to render a final decision in a timely fashion, so that the state may proceed to administer and enforce its plan with minimal disruption and confusion. In this case, EPA left the Commonwealth of Massachusetts, General Motors, and the public in a state of uncertainty over the validity of a proposed revision for nearly three years.[3]

[3] Long after the deadline expired, EPA in September 1988 published its final action on the day its brief was filed in the First Circuit. *See* note 11 below. GM has challenged EPA's action in a separate suit in the First Circuit.

B. The Massachusetts SIP Revision

General Motors owns and operates an automobile assembly plant in Framingham, Massachusetts. The plant has associated with it a paint shop that is the source of volatile organic compounds (VOCs). In 1979, the Commonwealth promulgated SIP regulations establishing limits on VOC emissions from automobile surface coating or painting operations. As originally promulgated, the regulation required full compliance by December 31, 1985.[4] This date in the SIP was two years earlier than the Clean Air Act's final 1987 compliance deadline. 42 U.S.C. § 7502(a)(2) (1982).

On October 20, 1981, EPA published a policy statement advocating deferral of the compliance dates in SIPs for automobile paint operations. 46 Fed. Reg. 51,386 (1981). The policy statement noted that the industry was developing new lower-emission techniques, such as basecoat/clearcoat technology, and that allowing a deferral of compliance to 1986 or 1987 would give the industry needed time to develop more cost-effective technology. *Id.* at 51,387. Pursuant to this policy, General Motors submitted a timely request for an extension of the deadline to the Commonwealth.[5] Following a public hearing, the Commonwealth revised the SIP regulation for automobile painting to extend the applicable deadline to August 31, 1987, a 20-month extension but still several

[4] In particular, 310 CMR 7.18(7) limits emissions from automobile surface coating, which includes "top coat" and "final repair" painting operations, the final steps in painting a new automobile.

[5] At the public hearing, an EPA representative expressed reservations but did not oppose the proposed revision.

months short of the final Clean Air Act deadline. The revised SIP was submitted by the Commonwealth to EPA for approval on December 30, 1985.

In reliance on the Commonwealth's action, General Motors continued to operate its then-existing paint facility during the 20-month extension. General Motors proceeded with its state-approved compliance strategy, spending over $200 million to construct a new lower-emitting paint facility using the basecoat/clearcoat system. The old Framingham paint facility was permanently shut down on July 7, 1987, more than a month before the Commonwealth's revised deadline.

During the entire period of the extension provided by the Commonwealth's revised SIP regulations, EPA failed to take final action to approve or disapprove the proposed revision. The initial deadline and the revised deadline both came and went. Instead of taking action on the SIP revision, the government proceeded to enforce the December 1985 deadline in the original SIP. On August 17, 1987, the United States filed a complaint in federal district court in Massachusetts seeking civil penalties for the violation of the 1985 deadline. The complaint made no mention of the company's compliance plan, of which EPA was fully aware, or of the state's revision of the SIP regulation to defer compliance to August 31, 1987. It also failed to mention that, despite the passage of nearly two years, EPA had still not taken final action on the SIP revision.

C. The Proceedings Below

On May 16, 1988, the District Court (McNaught, J.) granted summary judgment to General Motors.

United States v. *General Motors Corp.*, No. 87-2068 (D. Mass. 1982). The court held that the Clean Air Act required EPA to act on the Commonwealth's proposed SIP revision within four months, and that, having failed to do so, EPA was barred from enforcing the old SIP. Because in this case EPA had not made a final decision on the Commonwealth's SIP revision, the court held that fines could not be assessed and consequently that the Agency's enforcement action should be dismissed.

The District Court believed this rule was necessary to ensure that EPA did not simply pocket veto SIP revisions and thereby paralyze state regulatory processes once the initial SIPs were in place. Barring the Agency from enforcing an existing SIP until it ruled on proposed revisions was necessary, in the District Court's view, to provide EPA with sufficient incentive to conclude its review within the statutory four-month period. Noting that "EPA always holds the ultimate trump card" because it may at any time take final action on a SIP revision and begin enforcement proceedings, the District Court believed that barring enforcement struck the appropriate balance under the Act. Slip Op. at 7. The District Court expressly followed the decision of the Court of Appeals in *American Cyanamid Co.* v. *EPA*, 810 F.2d 493 (5th Cir. 1987).

The United States appealed the dismissal of its enforcement action. On June 7, 1989, the First Circuit entered its opinion (Coffin, J.) and judgment *reversing* the District Court's decision. *United States* v. *General Motors*, 876 F.2d 1060 (1st Cir. 1989). The Court of Appeals agreed with the District Court that EPA must complete its evaluation of SIP revisions within

four months. The First Circuit expressly declined, however, to follow the Fifth Circuit's rule in *American Cyanamid Co., supra*. Without citing any factual support, the First Circuit assumed that EPA would need longer than four months to act on SIPs even with the incentive of an enforcement bar, even though that assumption is contrary to the statute. The Court concluded that the additional incentive provided by the Fifth Circuit's rule is not outweighed by the harm done to the general public by prohibiting enforcement actions in cases where EPA fails to meet its deadline. 876 F.2d at 1067. The Court did not elaborate on the nature of this "harm" or explain why this "balancing" of policies should overcome the specific direction of Congress that EPA act promptly on SIP revisions.

The First Circuit acknowledged that GM had raised a number of issues concerning the equities of this case. In particular, the court noted that GM had relied on EPA's 1981 policy statement in deciding to convert its plant to BC/CC technology, and that the public was not harmed because the present system was environmentally superior. The First Circuit declined to comment on these issues, stating instead that GM is free to raise them before the District Court. The decision below states that the District Court has the responsibility for determining the amount of penalties to assess, and that the trial court may consider the reasonableness of the Agency's delay and the prejudice suffered by the company as a result. *Id.* at 1067-68.

REASONS FOR GRANTING THE WRIT

The Court should grant the petition for *certiorari* in this case for three reasons that the Court has traditionally deemed to warrant plenary review. First, this case presents major issues of federalism, comity, and the implementation of the Clean Air Act. Second, the decision below creates a conflict in the circuits and is contrary to the language and policies of the Clean Air Act. Third, the decision below involves recurring questions of nationwide importance concerning the enforcement of state plans under the Clean Air Act.

I. THE DECISION BELOW CREATES A CONFLICT IN THE CIRCUITS

The primary issue addressed by the First Circuit was whether, having failed to complete its review of a state's SIP revision within four months, EPA is barred from enforcing the old SIP. The First Circuit expressly declined to follow the decision in *American Cyanamid*, holding instead that EPA may bring an enforcement action, but that the District Court could take into account the Agency's delay in deciding the amount of penalties to assess. 876 F.2d at 1067-68.

In *American Cyanamid*, the State of Louisiana had submitted a revision to its SIP concerning the manner in which a company could demonstrate compliance with certain emission limitations. EPA did not act to approve or disapprove the revision. Long after the SIP revision was proposed, however, EPA initiated an enforcement action against American Cyanamid, charging it with violations of the old SIP requirements. The Fifth Circuit held that EPA was barred from enforcement under these circumstances, emphasizing the need to give EPA an incentive to respect the four-month rule.[6] The court held that permitting

[6] In reaching this result, *American Cyanamid* discussed at

EPA to benefit from its own inaction was impermissible in light of the resulting infringement of the state's right to timely consideration of its SIP revision. 810 F.2d at 500. EPA's distortion of the federal-state partnership created under the Act was of particular concern to the court:

> Where, as here, the state has proposed a revision to its SIP which clearly authorizes local businesses to act in accordance with it without running afoul of the Clean Air Act, *the interest of the state itself is deeply involved in the required four month approval or disapproval of the proposed revision.* It distorts the statutory scheme to place virtually full emphasis upon the business entity involved as a charged 'polluter.' The emphasis of the statute, rather, is upon the important role which the state plays in defining authorized emissions . . . . The issue then is not so much pollution by American Cyanamid but the *default of the EPA in carrying out the congressional intent to work in close co-*

length the contrary approach adopted by the D.C. Circuit in Duquesne Light Co. v. EPA, 698 F.2d 456 (D.C. Cir. 1983). In that case, the D.C. Circuit also held that EPA could not assess penalties for violation of an old SIP where it had failed to act within four months on a SIP revision. *Id.* at 471. The court found that assessment in such circumstances constituted an "inequitable use of the penalty powers." *Id.* at 472. The court suggested, however, that it might be permissible for the Agency to assess such penalties retroactively after it finally completed its review of the revision if it ultimately decided to disapprove it. To the extent that the *Duquesne* approach differs from both the *Cyanamid* and *General Motors* decisions, there is a "three-way" conflict in the circuits.

> *operation with the states* in implementing standards and enforcing the Clean Air Act. *We emphasize the importance of the EPA acting, not for the benefit of American Cyanamid, but for the benefit of the State of Louisiana . . . .*"

Id. (Emphasis added).

Moreover, the court expressed concern that failure to bar enforcement "may encourage the EPA to reject [SIP] revisions that it should accept." *Id.* at 499. As a practical matter, after such a long delay, and after initiating an enforcement proceeding, "EPA might be reluctant to approve Louisiana's revision and admit that American Cyanamid is not liable for noncompliance after all." *Id.* The court found that the disincentives raised by such a situation could endanger "EPA's even-handed administration of the Act." *Id.* This concern is starkly raised in the present case.[7]

The decision below thus creates an intolerable conflict among the circuits on an issue of fundamental importance. Moreover, it is contrary to the Clean Air Act because it gives the Agency little or no incentive to conclude its review of SIP revisions within the statutory time limit because, no matter how long the

[7] In this case, EPA's final disapproval was not issued until after the old paint shop was closed and a new $200 million paint shop had been built to comply with the revised SIP. The revision had then become irrelevant to anything other than the dismissed enforcement action. EPA had every incentive to disapprove the revision and no reason, from a regulatory standpoint, to determine properly whether that decision was correct on the merits. In this context, EPA's even-handed evaluation of the revision is particularly open to question.

Agency procrastinates, it knows that it may collect full penalties if the revision is ultimately rejected. *American Cyanamid*, 810 F.2d at 499.

The correct view, adopted by the Fifth Circuit in the *American Cyanamid* case, *supra*, is that enforcement under such circumstances is indeed barred. Contrary to the suggestion by the First Circuit, a bar of enforcement is not a drastic restriction of EPA's enforcement authority. Instead, it is a limited, carefully tailored rule providing simply that EPA, which basically has the power to act on a SIP revision at any time it chooses, may not bring an enforcement action under an old SIP until it has acted to approve or disapprove a SIP revision. Under this rule, the resulting bar on enforcement is one that EPA has created for itself.

II. THIS CASE PRESENTS MAJOR ISSUES OF FEDERALISM, COMITY AND THE IMPLEMENTATION OF THE CLEAN AIR ACT.

The Clean Air Act is a federal-state partnership in which the states have the primary role in establishing emission limitations. In order to assure that state prerogatives are given full effect, Congress has carefully circumscribed EPA's ability to interfere with a state's SIP by limiting the grounds on which EPA may decline to approve a SIP. This division of responsibility under the Act was highlighted by this Court in *Train* v. *NRDC*, *supra*:

> The Agency is plainly charged by the Act with the responsibility for setting the national ambient air standards. Just as plainly, however, it is relegated by the Act to a secondary role in the process of determining and enforcing the specific, source-by-source emission limitations which are necessary if the national standards it has set are to be met . . . The Act gives the Agency no authority to question the wisdom of a State's choices of emission limitations if they are part of a plan which satisfies the standards of Section 110(a)(2) . . . ."

421 U.S. at 79.

Congress did not want or intend SIPs to be carved into stone. It therefore empowered the states to promulgate SIP revisions, under § 110(a)(3) of the Clean Air Act, 42 U.S.C. § 7410(a)(3), with the same general oversight by EPA that existed for the original SIPs. Congress intended the expeditious approval of SIP revisions to be as important as the approval of original SIPs. The states' role in the administration of the Clean Air Act is a continuing one, and that role would be substantially jeopardized if EPA were permitted to ignore proposed SIP revisions for an extended period of time. For that reason, EPA is required to approve or disapprove original SIPs and SIP revisions within four months. 42 U.S.C. § 7410(a)(2), (3).[8]

To allow EPA to ignore proposed SIP revisions for an extended period of time would frustrate the purposes of the statute. As this Court stated in discussing § 110(a)(3) in *Train* v. *NRDC*, *supra*:

---

[8] *See* Duquesne Light Co. v. EPA, 698 F.2d 456, 471 (D.C. Cir. 1983); American Cyanamid Co., *supra*, 810 F.2d at 495; Council of Commuter Orgs. v. Thomas, 799 F.2d 879, 888 (2d Cir. 1986).

> Far from evincing congressional intent that the Agency assume control of a [s]tate's emission limitations mix once its initial plan is approved, the revision section is to all appearances the mechanism by which the states may obtain approval of their developing policy choices as to the most practicable and desirable methods of restricting total emissions to a level which is consistent with the national ambient air standards.

421 U.S. at 80.

Without a requirement of timely consideration of SIP revisions, EPA would, in essence, be permitted to appropriate to itself a state's right to choose among regulatory alternatives: if EPA prefers the revised SIP, it can approve it; where if it prefers the SIP in its original form, it can simply ignore the proposed revision or delay final action on the revision indefinitely while it enforces the old SIP.[9]

Important state interests are affected by EPA's failure to complete its review of a SIP revision in a timely manner. As the District Court noted:

> For an indefinite period, the state would be unable to act to balance the dictated national priorities with the interest of its citizens and industries as the Clean Air Act intended. And the industries themselves, though fully in compliance with state law, would in some instances face the Scylla and Charybdis choice between ceasing operations now, or possibly being forced out of business by heavy fines later.

United States v. *General Motors Corp.*, No. 87-2068 (D. Mass. May 16, 1988) Slip Op. at 7-8.

[9] Bethlehem Steel Corp. v. EPA, 782 F.2d 645, 650 (7th Cir. 1986). The courts have uniformly invalidated EPA attempts to interfere with a state's regulatory decision under the Act in this fashion. *See also* Indiana & Michigan Elec. Co. v. EPA, 733 F.2d 489, 492 (7th Cir. 1984).

The decision of the First Circuit provides EPA with little incentive to take timely action on SIP revisions. The approach adopted by the First Circuit results in precisely the type of unilateral federal regulation that the statute was designed to avoid. In effect, the Court of Appeals has given EPA a right—previously rejected by the court in *American Cyanamid*—to accomplish a "pocket veto" of a SIP revision by failing to take final action.

III. THE ISSUE PRESENTED INVOLVES IMPORTANT, RECURRING QUESTIONS CONCERNING ENFORCEMENT UNDER THE CLEAN AIR ACT.

In a program as important and complex as the Clean Air Act, it is vital that all parties involved understand the means by which SIP plans and plan revisions may be subject to enforcement. The decision below raises a host of problems concerning the proper balance between State and federal prerogatives under the statute. As a result of the conflict in the circuits on this important issue, the thousands of industrial facilities throughout the country that are subject to SIP requirements can have no certainty as to the enforceability of SIP provisions which have been superseded by state revisions to the plans.[10]

[10] In 1987, EPA processed 56 SIP revisions in Region I, one of 10 EPA Regions, according to EPA data presented to the

As discussed above, states must continually revise their SIP regulations in order to insure attainment of the national standards. Prompt action by EPA on SIP revisions is essential to allow the states to continue with their regulatory planning and implementation, and to enable industry to plan and construct necessary control equipment. EPA's failure to act promptly places the states and industry in limbo, with no guidance as to how to proceed. The decision of the First Circuit encourages EPA to be dilatory in reviewing revised state plans, and frustrates state and industry efforts to take appropriate and cost-effective steps toward attainment of the nation's air quality goals.

EPA's failure to take timely action on a revised SIP creates an anomaly in enforcement. A revised SIP is a revision in state regulations which amends state law; once adopted the state may enforce only the revised SIP. Under the First Circuit's approach, EPA may enforce the old SIP, regardless of whether a violation exists under the revised SIP. We submit that it is absurd to suggest that Congress intended that a Clean Air Act SIP, the product of a joint federal and state effort under the Clean Air Act, would be enforceable in federal courts but not state courts. *See Sierra Club* v. *Indiana-Kentucky Elec. Corp.*, 716 F.2d 1145, 1151 (7th Cir. 1983). The four-month deadline for the review of SIP revisions was plainly designed to eliminate this anomaly. Because the decision below does not give due regard to the

District Court. One-fourth of the EPA Region I enforcement actions from 1985-88 involved cases where a revised SIP was being developed or had been submitted.

appropriate role of the states under the Clean Air Act, the mandate of Congress has been thwarted.

Moreover, allowing enforcement to proceed in the absence of final action on a SIP calls into severe question the even-handedness of the SIP review process itself. As the *American Cyanamid* court pointed out, it will be difficult, if not impossible, for EPA to review a SIP revision objectively when it has already initiated an enforcement proceeding. Failure to bar enforcement "may encourage the EPA to reject [SIP] revisions that it should accept." 810 F.2d at 499.

The disincentives created by such a situation are certain to endanger EPA's even-handed administration of the Act. This concern is particularly strong in the present General Motors case. On the very same day that its opening brief was served in the First Circuit, and more than two years after the Commonwealth of Massachusetts had submitted its SIP revision, EPA published a determination disapproving the SIP revision.[11] The only possible purpose of the belated EPA action was to serve as a last-minute attempt to bolster the government's position on appeal. It is clear that EPA viewed its regulatory and enforcement decisions as part of a single, combined strategy in which enforcement would be given priority. Under those circumstances, objective review of the SIP revision became a practical impossibility.

It is also significant to note that EPA's delay in this case, and in the *American Cyanamid* case, involves situations where the companies were attempting to implement programs that *benefit* the

[11] 53 Fed. Reg. 36,011 (1988).

environment. In the present case, for example, the long-term emissions from General Motor's Framingham plant were reduced through the construction of a new paint facility that has substantially lower emissions than the old one was required to attain under the Commonwealth's rules. In reliance on EPA's 1981 policy, and with the Commonwealth's concurrence, General Motors, spent $200 million to build the new, lower emitting basecoat/clearcoat paint shop. General Motors continued to operate its old lacquer paint shop until July 1987, when the old facilities were permanently shut down. General Motors was highly prejudiced by EPA's actions in this case, and similar cases are certain to arise repeatedly in the future.

CONCLUSION

For the reasons stated above, the petition for a writ of *certiorari* should be granted.

Respectfully submitted,

THEODORE L. GARRETT
(Attorney of Record)

COVINGTON & BURLING
1201 Pennsylvania Ave., NW
P.O. Box 7566
Washington, D.C. 20044
(202) 662-5398

Attorney for General Motors Corporation

Of Counsel:

PATRICK J. MCCARROLL
Legal Staff
General Motors Corporation
New Center One Building
3031 West Grand Boulevard
Detroit, Michigan 48232

September 1989

APPENDIX

APPENDICES

Page

APPENDIX A

United States v. General Motors Corporation, No. 88-1799 (1st Cir. June 7, 1989) ... 1a

APPENDIX B

List of Subsidiaries and Affiliates of General Motors Corporation 19a

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 88-1799.

UNITED STATES OF AMERICA
Plaintiff, Appellant,

v.

GENERAL MOTORS CORPORATION
Defendant, Appellee.

JUDGMENT

Entered: June 7, 1989

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the District Court is reversed and the cause is remanded to the District Court for further proceedings not inconsistent with the opinion filed this date.

By the Court:

_____
Clerk.

[cc: Messrs. Shilton, Garrett and Ms. McCabe]

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 88-1799

UNITED STATES OF AMERICA,
Plaintiff, Appellant,

v.

GENERAL MOTORS CORPORATION,
Defendant, Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS
[Hon. John J. McNaught, *U.S. District Judge*]

Before
Campbell, *Chief Judge*,
Coffin and Torruella, *Circuit Judges*.

David C. Shilton, Land and Natural Resources Division, Department of Justice, with whom *Roger J. Marzulla*, Assistant Attorney General, *Richard J. Leon*, Deputy Assistant Attorney General, *Jaques B. Gelin* and *William D. Brighton*, Land and Natural Resources Division, Department of Justice, were on brief for the United States.

Theodore L. Garrett with whom *Sonya D. Winner, Covington & Burling, Kenneth A. Reich, Widett, Slater & Goldman*, and *Patrick J. McCarroll* were on brief for appellee.

Janet G. McCabe, Environmental Protection Division, Department of the Attorney General, and *Lee P. Breckenridge*,

Chief, Environmental Protection Division, on brief for the Commonwealth of Massachusetts, Amicus Curiae.

JUNE 7, 1989

COFFIN, *Circuit Judge*. This is an appeal by the Environmental Protection Agency (EPA) from the district court's dismissal of its enforcement action under the Clean Air Act, 42 U.S.C. § 7401 *et. seq.*, against appellee General Motors. The case requires us to answer two statutory questions. First, does the four-month time limit for EPA action on original state implementation plans (SIPs) also apply to the Agency's review of proposed revisions to existing state plans. Second, assuming the EPA must complete its review of SIP revisions within four months, does its failure to do so prevent it from enforcing an existing state implementation plan during the interval between the end of the four-month period and the time the agency finally rules on the revision.

I.

The Clean Air Act

During the 1950s and 1960s, the responsibility for improving the nation's air quality fell to the states, with the federal government playing only a minor role. Over the years, however, there was growing dissatisfaction with the states' effort to combat air pollution. Congress responded with the 1970 Amendments to the Clean Air Act (the Act). Although the Amendments greatly increased the federal government's role, they by no means eliminated the states' responsibility for improving air quality. To the contrary, the Act expressly preserved the principle "that the prevention and control of air pollution at its source is the primary responsibility of States and local governments. . . ." § 101(a)(3) 42 U.S.C. § 7401(a) (3) *See Train* v. *Natural Resources Defense Council*, 421 U.S. 60, 64 (1975). Thus, the states and the federal government were now to be partners in the continuing fight against air pollution.

The division of responsibility is straightforward and logical. The EPA, the federal agency charged with administering the Act, has the task of establishing National Ambient Air Quality Standards (NAAQS). The states then have the responsibility of submitting for EPA approval state implementation plans (SIPs) designed to achieve and maintain these uniform standards. § 110(a)(1). By giving the EPA authority to set threshold standards and to reject implementation plans that are ill-designed to achieve and maintain such standards, Congress ensured that states could not compete unfairly for industry by offering lenient air requirements. *See Duquesne Light* v. *EPA*, 698 F.2d 456, 471 (D.C. Cir. 1983); *United States* v. *Ford Motor Co.*, 814 F.2d 1099, 1102 (6th Cir. 1987). At the same time, however, Congress believed it important that the states retain wide latitude in choosing how best to achieve national standards, given local needs and conditions. The EPA, therefore, may not reject a SIP unless it finds that the plan fails to satisfy the substantive requirements set out in the Act, the principal one of which is that the plan be designed to attain national standards as quickly as practicable. § 110 (a)(2)(A)-(K). "[S]o long as the ultimate effect of a State's choice of emission limitations is compliance with the national standards for ambient air, the State is at liberty to adopt whatever mix of emission limitations it deems best suited to its particular situation." *Train*, 421 U.S. at 79.

Congress also recognized that, because of advances in technology and changing local conditions, states would occasionally wish to revise their original implementation plans. The EPA may reject these SIP revisions, but its authority to do so is no greater than its authority to reject an original SIP. A state's proposed revision must be approved, therefore, unless it fails to satisfy one of the requirements set out in § 110(a) (2) governing the evaluation of original SIPs. § 110(a) (3) (A).

Once an original or revised SIP is approved by the EPA, it becomes federal law and is enforceable in one of two ways.

Under either method, the first step is for the EPA to issue a Notice of Noncompliance. If the violation continues and the EPA cannot through negotiations reach some agreement with the polluting source, the Agency may enforce the SIP either by issuing an administrative order under § 120 or by instituting an enforcement action under § 113, which provides for injunctive relief as well as for civil penalties of up to $25,000 per day. Criminal penalties for knowing violations are also authorized. § 113(c).

Under § 120, the administrative mechanism, fines begin to accrue upon the issuance of a Notice of Noncompliance and are intended to offset the economic benefit to the company of delaying compliance. *See Duquesne Light*, 698 F.2d at 464. Under § 113, the mechanism employed in this case, the EPA must bring an enforcement action in the district court to collect penalties. The court is given the responsibility of determining the amount of penalties to assess, taking into consideration such factors as the seriousness of the violation and the economic impact of the penalty on the business. § 113(b).

Given the sense of urgency with which the 1970 Amendments were passed, it is not surprising that Congress did not leave the states and EPA free to work at their own pace in accomplishing these tasks. The Act is laced with deadlines applicable to both the states and the Agency. Of concern to us here are the deadlines for EPA review of state implementation plans. It is undisputed that the EPA must complete its review of original SIPs within four months. § 110(a) (2) ("The Administrator shall, within four months . . . , approve or disapprove [original SIPs]"). Unlike § 110(a) (2) however, § 110(a) (3) (A) which governs EPA review of SIP revisions, does not contain language explicitly imposing a four-month deadline on the Agency. Whether Congress nevertheless intended for the Agency to complete its review of SIP revisions within four months is the question giving rise to the instant dispute.

The Massachusetts SIPs

General Motors owns and operates an automobile assembly plant in Framingham, Massachusetts. The plant's painting operation is the source of volatile organic compounds (VOCs) which contribute to ozone. In 1980, the EPA approved a Massachusetts SIP governing VOC emissions from automobile painting operations. The plan permitted GM, which operates the only automobile assembly plant in the state, to meet emission limits in stages, but required full compliance by December 31, 1985.

In 1981, the EPA published a policy statement in which it noted that advancing technology now made it practicable for automobile painting operations to switch from lacquer paints to lower-emitting basecoat/clearcoat enamel systems (BC/CC). In light of these developments, the Agency stated that it would be willing to approve SIP revisions deferring compliance with emissions limits until 1986 or 1987 for companies wishing to switch to the BC/CC system. Although GM's Framingham plant used lacquer paints, the company took no immediate action in response to the EPA's offer. GM did request revisions, however, for three of its assembly plants in other states within ten days of the EPA's statement.

Three years later, in November of 1984, GM decided that it now wished to defer the December 31, 1985, compliance date imposed by the existing Massachusetts SIP. The proposed revision it submitted to the Commonwealth did not call, however, for a conversion to BC/CC technology, but rather requested a deferral to give the company additional time to install emission controls on its existing lacquer coating lines. In June of 1985, GM changed course and finally proposed converting the Framingham plant to BC/CC by the summer of 1987, which would give it an additional 20 months to meet the final emission limits. The Commonwealth approved the revision and submitted the proposal to the EPA

on December 30, 1985—one day before the existing SIP's final compliance deadline.

The Enforcement Proceedings

Rather than wait for EPA approval of its proposed revision, GM began construction on a new BC/CC painting facility while at the same time continuing to operate its lacquer plant. EPA Region I, the branch of the Agency responsible for evaluating SIP revisions from New England states, began reviewing the proposal while also entering into negotiations with the Commonwealth and GM in the hope of resolving GM's noncompliance with the existing SIP's deadline by means of a delayed compliance schedule.[1]

On July 2, 1986, with negotiations apparently having failed, Region I sent to EPA headquarters a proposal to disapprove the revision. On August 14, 1986, EPA issued a Notice of Violation to GM concerning violations of the existing SIP by the company's lacquer plant— a prerequisite to the bringing of an enforcement action. Later that year, on December 2, EPA published a proposed disapproval of the Commonwealth's SIP revision based on Region I's July 2 evaluation. The proposed disapproval explained in detail why the Agency was considering rejecting the revision and invited public comment.

The feedback EPA received apparently did not convince Region I that its initial view had been misguided and on June 30, 1987, it recommended to EPA Headquarters that the proposed revision be rejected. Roughly two months later, on August 17, the EPA brought this enforcement action against GM under § 113 of the Act for alleged violations of

---

[1] GM contends that to this date there has been no finding that its lacquer plant failed to comply with the existing SIP's December 31, 1985, deadline. The EPA finds this statement "incredible," pointing to the district court's opinion below as well as to an affidavit by one of the company's own engineers. If GM's continuing operation of its lacquer plant did not in fact violate the existing SIP, we are curious as to why the company is so concerned with the EPA's attempts to enforce the regulation.

the existing SIP's 1985 deadline. It was not until over a year later, on September 4, 1988, that the Agency made its final decision to reject the revision. By that time, the district court had dismissed EPA's enforcement action and GM had closed its lacquer plant in favor of its recently completed basecoat/clearcoat facility, which GM points out was in operation well before the August 1987 deadline set by the rejected SIP revision.[2] The Agency's decision was published on September 16, 1988, the day briefs were filed in this court.

The District Court's Decision

The district court began by construing § 110(a) (3) (A) of the Act to impose a four-month time limit on EPA review of SIP revisions. Noting that the Agency still had not made a final decision on the Commonwealth's SIP revision, the court went on to address the consequences of EPA's failure to meet the four-month deadline. After examining the Act's structure and purposes, the court concluded that if the Agency failed to complete its review within four months, it was barred from enforcing the existing SIP during the interval between the end of the four-month period and the time EPA finally acts on the revision. Because the EPA had not issued a Notice of Noncompliance until well after the four-month period had lapsed and had yet to make a final decision on the Commonwealth's SIP revision, the court held that fines could not be assessed, and consequently, that the Agency's enforcement action should be dismissed.

The court believed this rule necessary to ensure that the EPA did not sit on SIP revisions and thereby exclude the states from the regulatory process once the initial SIPs were in place. Barring the Agency from enforcing an existing SIP until it ruled on proposed revisions would, in the court's

[2] The EPA's complaint initially sought both injunctive relief and civil penalties. After learning that GM had shut down its lacquer plant, the Agency abandoned its claim for injunctive relief.

view, provide the EPA with sufficient incentive to conclude its review within the four-month period. The court recognized that the Act's primary purpose was to improve the nation's air quality. I concluded, however, that the public need not suffer under this rule because the "EPA always holds the ultimate trump card . . . [and] may at any time during or after the allowed four month period reject the proposal and invoke enforcement proceedings under the original SIP." In the court's view, then, its rule struck the appropriate balance under the Act, preserving the states' ability to tailor regulatory standards to their local needs, while at the same time allowing the EPA to continue protecting the public.

II

The threshold question is whether the Act imposes a four-month deadline on EPA review of SIP revisions. It is undisputed that the Agency must complete its evaluation of original SIPs within four months. Section 110(a) (2) which applies to original SIPs, states:

> The Administrator shall, within four months after the date required for submission of a plan under paragraph (1), approve or disapprove such plan or each portion thereof. The Administrator shall approve such plan . . . if he determines that it was adopted after reasonable notice and hearing and that [it satisfies the substantive requirements specified in subparagraphs (A) -(K)].

Section 110(a) (3) (A), which governs EPA review of SIP revisions, does not contain this four-month language:

> The Administrator shall approve any revision of an implementation plan . . . if he determines that it meets the requirements of paragraph (2) [§ 110(a)(2)] and has been adopted by the State after reasonable notice and public hearings.

GM contends, however, that the reference to § 110(a) (2) was intended to incorporate both the substantive and procedural

requirements of that provision. The Commonwealth, in its capacity as amicus, agrees with this reading of the Act. The EPA, on the other hand, argues that the word "it" in § 110(a)(3)(A) clearly refers to the SIP revision, and not the Administrator, and therefore, that § 110(a)(3)(A) can fairly be read to incorporate only paragraph two's substantive standards and not the four-month rule as well.

Both sides further contend that the Act's structure and legislative history support their interpretation. GM stresses that while the fundamental purpose of the Act is to improve the nation's air quality, Congress made it clear that the states were to play an integral and continuing role in determining how best to achieve this goal. That the states' local interests, economic and otherwise, were to be considered in devising the regulatory framework is evident from Congress' decision to limit the EPA's discretion to reject a state plan. That the states' role was not to decrease after the initial regulatory framework was in place is clear from the fact that Congress not only provided the states with a means of revising their original plans, but also by the fact that the Act gives the Agency no more discretion to reject a SIP revision than to reject an original SIP.

GM claims that by taking nearly three years to issue a final decision, as it did in this case, the EPA has given itself what amounts to a "pocket veto" over SIP revisions, allowing it to frustrate the states' developing policy choices for no reason or any reason, a power the Agency clearly does not have under the Act. Moreover, it adds, without prompt action by the Agency, companies are left in limbo, unable to plan their future activities with any certainty. In this case, GM says it was forced to choose between continuing to operate a technologically outdated system or beginning construction on a new, lower-emitting plant, risking EPA disapproval down the line.

The EPA does not dispute that the Act contemplates continuing participation by the states. It argues, however, that

a four-month deadline is unnecessary to ensure this ongoing participation. As long as the Agency is under a general duty to act without unreasonable delay, which it concedes it is, the states' role will be preserved. Where Congress believed that a more specific deadline was needed, it expressly said so. It makes sense in the Agency's view that Congress imposed a four-month deadline on EPA review of original SIPs because it was concerned with getting the basic regulatory framework in place as quickly as possible. According to the Agency, this abbreviated time frame was feasible only because much of the groundwork for the original SIPs had been done prior to the start of the four-month period. Once the initial pollution controls were in place, however, the EPA believes Congress did not intend for it to continue working at such a hectic pace. Moreover, it simply is not possible, the Agency argues, for it to review every SIP revision within four months without sacrificing competing priorities.

We begin by stating that we do not believe this is an appropriate issue on which to defer to the Agency. We concede that there is some doubt as to Congress' intentions, but the mere existence of ambiguity is not reason enough in our view to defer. Congress did not use inherently broad language here suggesting that it intended for the EPA to fill in the gaps, nor is there any other indication that Congress wished to delegate interpretive authority to the Agency on this issue. Moreover, we think it dangerous to defer in a situation such as this where the Agency has a substantial institutional interest in not imposing constraints on itself.

The question admittedly is a close one, but on balance we believe GM's (and the Commonwealth's) reading of the Act is the correct one. Congress clearly was concerned with preserving the states' ability to tailor SIPs to local needs and conditions and, just as plainly, did not care what controls states chose, so long as they were designed to reduce emissions to nationally acceptable levels. The states' freedom to make such choices obviously is curtailed to the extent that SIPs must be consistent with federal standards. It seems

unlikely, however, that Congress also intended for the states' legitimate policy choices to be held hostage to the EPA's schedule. We conclude, therefore, that the four-month deadline was meant to apply to EPA review of SIP revisions as well as to EPA review of original SIPs. This conclusion is in line with the views of all but one of our sister circuits. *See Duquesne Light*, 698 F.2d 456, 471 (D.C. Cir. 1983) (four-month deadline); *American Cyanamid Co.* v. *U.S.E.P.A.*, 810 F.2d 493, 495 (5th Cir. 1987) (same) *Council of Commuter Organizations* v. *Thomas*, 799 F. 2d 879, 888 (2nd Cir. 1986) (same); *but see United States* v. *National Steel Corp.*, 767 F.2d 1176, 1182 n.1 (6th Cir. 1985) (no four-month rule, but arguably dicta). We add that by imposing a four-month deadline on the EPA, we avoid the possibility that the Agency would have assigned a lower priority to SIP revisions from First Circuit states than to those from states in circuits that had imposed a deadline.

III

The question that remains is what consequences should flow from the Agency's failure to observe the four-month deadline. The two circuits that have addressed the issue, the Fifth and the D.C., have taken extreme and directly contrary approaches. The district court adopted the Fifth Circuit's rule in *American Cyanamid Co.* v. *U.S.E.P.A.*, 810 F.2d 493 (5th Cir. 1987), and held that if the Agency misses the statutory deadline, it is barred from collecting penalties under the existing SIP for the interval between the end of the four-month period and the time the agency finally rules on the revision. The Fifth Circuit believed this rule necessary because without the prospect of an enforcement bar looming over the review process, there simply would be too little incentive for the Agency to comply with the four-month time limit. The court stressed that its holding was based on "the importance of the EPA acting, not for the benefit of American Cyanamid, but for the benefit of the State of Louisiana

which is by statute designated to play a significant cooperating role with the EPA." *Id.* at 500.

In reaching this result, the *American Cyanamid* court discussed at length the contrary approach adopted by the D.C. Circuit in *Duquesne Light*, 698 F.2d 456. Rather than bar the Agency from enforcing an existing SIP, the D.C. Circuit concluded that after four months, the penalty should be held in abeyance pending the Agency's final decision on the proposed revision. If the revision is ultimately rejected, penalties may be assessed retroactively, with interest, for the entire period after the deadline. The Fifth Circuit rejected this rule on the ground that it gives the Agency little or no incentive to conclude its review within the statutory time limit because, no matter how long the Agency procrastinates, it knows that it may collect full penalties if the revision is ultimately rejected. *American Cyanamid*, 810 F.2d at 499.

There is no question that the Fifth Circuit's rule provides the Agency with the greatest incentive to complete its review within four months. Were we certain that with the incentive of an enforcement bar, the Agency not only would review every SIP revision within four months, but could do so in a thorough and complete manner without sacrificing equally important congressional objectives, we would be willing to consider such a remedy. But far from being certain that the Agency could accomplish this task, we think it likely that the Agency frequently will need longer than four months to issue a considered ruling, and will therefore miss the deadline even with the incentive of an enforcement bar.

The EPA adds that if the Agency's failure to meet the four-month deadline automatically resulted in an enforcement bar, states might simply flood the Agency with disingenuous SIP revisions at the behest of influential companies, thereby ensuring that the bar was triggered. Although we recognize that Congress was concerned with the possibility of states placing their local interests above the goal of pure air, we find it unnecessary here to invoke the specter of states em-

ploying unsavory tactics. We think that even with the submission of only good-faith proposals, the EPA inevitably will often miss the deadline.

Given this practical reality, we are left with the question of whether the additional incentive provided by the Fifth Circuit's rule and the resulting benefit to the states of hurried EPA action outweighs the harm done to the general public by prohibiting enforcement actions in those inevitable instances when the Agency fails to meet its deadline. Because we believe that the Clean Air Act sets up a hierarchy of priorities in which the goal of improving the nation's air plainly takes precedence over the states' interests in protecting its local industry, we opt for a remedy short of an automatic bar.

In our view, an enforcement bar simply is too drastic. If the EPA cannot enforce existing standards, it is the public and not the EPA that is hurt. It does not matter why the EPA failed to meet the time limit—the public is hurt by an enforcement bar regardless of the reason for the Agency's tardiness. We agree with the Fifth Circuit, however, that the D.C. Circuit's rule appears to err on the other end by giving the Agency too little incentive to act in a timely manner. Accordingly, we have attempted to steer a middle course between these two extremes, one which permits trial courts to take account of the circumstances of each case and hopefully accommodate both the states' needs and the public's desire for clean air.

The remedy we suggest is twofold. First, if in a company's view the EPA is taking too long to review a proposed revision, the company may at any time after the end of the four-month period bring suit in the district court under § 304(a)(2) of the Act to compel agency action. 42 U.S.C. § 7604(a)(2). *See Council of Commuter Organizations*, 799 F.2d at 888 (2nd Cir. 1986). The district court should assess the Agency's reasons for not complying with the four-month time limit and take such action as it deems reasonable. The

court should not, of course, equate the Agency's failure to meet the four-month time limit with Agency unreasonableness. To do so would be tantamount to adopting the Fifth Circuit's automatic bar rule. Rather, the court should evaluate the circumstances of each case, with the failure to observe the four-month deadline being one factor to consider—a rough guidepost. In some cases, the court undoubtedly will find that four months is sufficient and in others, it will be clear that the Agency could not reasonably have met the deadline. We note that in this case, despite the clear availability of this remedy, GM did not bring an action to compel the Agency to act.

The second remedy for EPA delay is of the same nature. When the Agency brings an enforcement action under § 113, the district court has the responsibility for determining the amount of penalties to assess. The Act expressly permits the court to "take into consideration (in addition to other factors) the size of the business, the economic impact of the penalty on the business, and the seriousness of the violation." § 113(b). The EPA agrees that, among these "other factors," the court may consider the reasonableness of the Agency's delay and the prejudice, if any, suffered by the company as a result. If, for example, a trial court finds that the review process should have taken ten months rather than two years, it may decline to award penalties for the fourteen months of unwarranted delay. Accordingly, if on remand in this case, the district court finds that GM was prejudiced by the Agency's lengthy review and that the delay was not justified or that some portion of the delay was not justified, it may reduce the penalties in a manner it sees fit.[8]

We think that giving the district court the power to adjust the penalties will provide the Agency with the necessary

---

[8] We do not understand EPA's position in this case to be that because GM did not bring an earlier action to compel an Agency decision, it has forfeited the right to argue below that the Agency's delay was unreasonable.

incentive to act without unreasonable delay.[4] To have chosen the more drastic remedy of an enforcement bar and thereby place the states' interests over the public's, we would have needed some indication from Congress that the public was to bear the brunt of the Agency's failure to observe a deadline. As the Supreme Court reiterated in *Brock* v. *Pierce County*, 476 U.S. 253 (1986), "the great principle of public policy, applicable to all governments alike, . . . forbids that the public interests should be prejudiced by the negligence of the officers or agents to whose care they are confided." *Id.* at 260 (internal quotes omitted). We find it significant that not even the Commonwealth argues for an enforcement bar, thus recognizing that its interests occasionally must yield to the overriding goal of improving our nation's air. Hopefully the remedies we provide will induce prompt EPA action and thus ensure that the interests of the states need not yield too far.

GM claims that an enforcement bar is necessary, however, not only to induce timely action by the Agency, but also to protect the integrity of the review process. Citing this case as a particularly egregious example, it argues that when the Agency brings an enforcement action prior to issuing its final decision, the possibility exists that the Agency will reject the proposal for the sole purpose of supporting its pending enforcement action. We think this argument proves too much. If the Agency were to initiate an enforcement proceeding under the existing SIP after two months and then reject the proposed revision one month later but within the four-month time limit, GM still could argue that the Agency rejected the revision in order not to undermine its enforcement proceeding. Thus, the potential for Agency bias results

[4] We note that both the D.C. Circuit and Fifth Circuit were dealing with § 120 penalties rather than a § 113 enforcement action. It is not clear whether, under § 120, penalties may be adjusted in this manner. If they can, it may very well be that, contrary to our earlier suggestion and the Fifth Circuit's understanding, the D.C. Circuit's rule does contemplate that unreasonable Agency delay will be taken into account in assessing penalties.

not from the Agency's failure to complete its review within four months but from Congress' decision to assign the EPA the responsibility for both reviewing plans and enforcing them. To the extent, then, that this is a potential problem in all cases, we are not overly concerned. Congress expressly provided companies with a means of challenging final Agency decisions in the courts of appeals. *See* § 307(b)(1). Apparently GM has availed itself of this remedy and we are confident that if the Commonwealth's revision was denied for improper reasons, the court will take appropriate action.[5]

Finally, GM raises a number of issues concerning the equities of this case. It claims, among other things, (1) that the company relied on the Agency's 1981 policy statement in deciding to convert its plant to BC/CC technology; (2) that its decision to wait until June of 1985 to propose the conversion was not made in bad faith; and (3) that the public was not harmed because its present system is environmentally superior. On the record before us, we simply have no way of assessing the validity of these claims, nor is it important that we do so. This appeal required us to interpret the Act and devise a generally applicable rule. Because these final claims are peculiar to the instant case and do not raise systemic issues suggesting the superiority of one rule or another, they need not concern us here. GM is of course free to raise them before the district court. Indeed, we have

[5] We note that in this case the Agency did not bring its enforcement action until after Region I had recommended to EPA Headquarters that the Commonwealth's revision be rejected. Headquarters apparently may reject this recommendation. But the timing of events does suggest that, as of August 17, 1987, when the enforcement action was initiated, there was little hope of the Commonwealth's proposal being approved. We, of course, take no definitive position on whether this was in fact the case.

declined to adopt an inflexible rule precisely so that the equities of each case may be considered.[6]
Reversed and remanded for further proceedings not inconsistent with this opinion.

---

[6] We add that by not precluding enforcement where the Agency fails to meet its deadline, we avoid possibly rendering superfluous the actions of a later Congress. In the 1977 Amendments to the Clean Air Act, Congress added § 110(g), which gives governors the power in emergency situations to suspend an existing SIP for a short period. The Governor may do so where (1) the EPA has not acted on a proposed SIP revision within "the required four month period"; (2) the state believes the revision meets the substantive requirements of the Act; and (3) the revision is necessary to prevent substantial unemployment due to plant closings. This section makes clear that the 1977 Congress believed the 1970 Amendments imposed a four-month deadline on the Agency's review of SIP revisions. It also shows that this later Congress did not assume that if the Agency missed the deadline, it automatically would lose its power to enforce the existing SIP until such time as it issued a final decision. Otherwise, there would have been no need to give governors the power to suspend enforcement of an existing SIP while a revision was pending, since the existing SIP already would be unenforceable due to the Agency's failure to meet the four-month deadline. The Act, however, clearly gives the Governor the power to suspend the existing SIP prior to the Agency's final decision.

APPENDIX B

General Motors Corporation is not a subsidiary of a publicly owned corporation. All subsidiaries and affiliates of General Motors Corporation are wholly owned except the following:

ACE Limited (Bermuda)
Aero Vironment Inc. (USA)
Alambrados Automotrices, S.A. de C.V. (Mexico)
Alambrados y Circuitos Electricos, S.A. de C.V. (Mexico)
AMBRAKE Corporation (USA)
Applied Intelligence Systems, Inc. (USA)
Aralmex, S.A. de C.V. (Mexico)
Asset Leasing GmbH (West Germany)
Automotive Polymer Based Composites Joint Venture and Development Partnership (Co-Partnership among GM, Ford and Chrysler to coordinate basic research on plastic component materials)
Automotive Satellite Television (USA)
Autos y Maquinas del Ecuador S.A. (AYMESA) (Ecuador)
Avis, Inc. (USA)
Beijing International Information Processing Company, Limited (China)
British Caledonian Flight Training, Limited (England)
Bujias Mexicanas, S.A. de C.V. (Mexico)
Calsonic Harrison Co., Ltd. (Japan)
Comau Productivity Systems, Inc. (USA)
Compagnie de Faisceaux Tunisian International S.A. (Tunisia)
Compania Nacional de Direcciones Automotrices, S.A. de C.V. (Mexico)
Componentes Delfa, C.A. (Venezuela)
Convesco Vehicles Sales GmbH (West Germany)
Daewoo Automotive Components, Ltd. (Korea)
Daewoo Motor Co., Ltd. (Korea)

Delkor Battery Company, Ltd. (Korea)
Detroit Diesel Corporation (USA)
DHB—Componentes Automotivos S.A. (Brazil)
DHMS Industries, Ltd. (Korea)
Diffracto Limited (Canada)
Fabrica Colombiana de Automotores S.A. ("Colomotores") (Colombia)
Gemeinnutzige Opel-Wohnbau-Gesellschaft mbH (West Germany)
General Motors Bankgesellschaft mbH (Austria)
General Motors del Ecuador S.A. (Ecuador)
General Motors Kenya Limited (Kenya)
Genie Mecanique Zairose, S.A.R.L. (Zaire)
GM Allison Japan Limited (Japan)
GM Fanuc Robotics Corporation (USA)
Group Lotos, plc (England)
Hitachi Data Systems Corporation (USA)
Ilmor Engineering, Ltd. (England)
Industries Mecaniques Maghrebines, S.A. (Tunisia)
Industrija Delova Automobila, Kikinda (Yugoslavia)
Interactive Entertainment, Inc. (Canada)
Isuzu-General Motors Australia Limited (Japan)
Isuzu Motors Limited (Japan)
Isuzu Motors Overseas Distribution Corp. (Japan)
Japan Satellite Communications Network Corporation (Japan)
Kabelwerke Reinshagen GmbH (West Germany)
Kabelwerke Reinshagen Werk Berlin GmbH (West Germany)
Kabelwerke Reinshagen Werk Neumarkt GmbH (West Germany)
Koram Plastics Company, Ltd. (Korea)
Metal Casting Technology, Inc. (USA)
Motor Enterprises, Inc. (USA)
National Advanced Systems Corporation (USA)
New United Motor Manufacturing, Inc. (USA)
NHK Inland Corporation (Japan)

Omnibus BB Transportes, S.A. (Ecuador)
Promotora de Partes Electronics Automotrices (Mexico)
P.T. Mesin Isuzu Indonesia (Indonesia)
Senalizacion y Accesorios del Automovil Yorka, S.A. (Spain)
Shinsung Packard Company, Ltd. (Korea)
Sung San Company, Ltd. (Korea)
Suzuki Motor Co., Ltd. (Japan)
Tactical Truck Corporation (USA)
View Engineering (USA)
Volvo GM Heavy Truck Corporation (USA)